

FCC MAIL SECTION

Federal Communications Commission

FCC 96D-06

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	MM DOCKET NO. 96-116
)	
HOMETOWN MEDIA, INC.)	File No. BR-950601B9
)	
For Renewal of License)	
for Station WAYB(AM))	
Waynesboro, Virginia)	
)	

Appearances

William D. Silva, on behalf of Hometown Media, Inc.; and Alan E. Aronowitz, on behalf of the Mass Media Bureau.

**SUMMARY DECISION
OF
ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN**

Issued: September 13, 1996**Released: September 17, 1996**Preliminary Statement

1. The Hearing Designation Order (HDO) issued by the Assistant Chief, Audio Services Division, Mass Media Bureau (Bureau) specified the following issues against Hometown Media, Inc. (Hometown):

(1) To determine whether Hometown Media, Inc. has the capability and intent to expeditiously resume the broadcast operations of WAYB(AM), consistent with the Commission's Rules.

(2) To determine whether Hometown Media, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license applications would serve the public interest, convenience and necessity.

The HDO further provided that in the event it is determined that a grant of the renewal application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation. HDO at para. 4. The HDO placed upon Hometown both the burden of proceeding with the introduction of evidence and the burden of proof. *Id.* at para. 8. A prehearing conference was held on July 16, 1996. (Tr. 1-28).

2. On July 11, 1996, Hometown filed a motion for summary decision seeking favorable resolution of the designated issues. Hometown supplemented its motion on July 17, 1996. On July 23, 1996, the Bureau filed an opposition to Hometown's motion and a countermotion for summary decision. The Bureau agrees with Hometown that summary resolution of the issues in this proceeding is appropriate. It urges, however, in its countermotion that Hometown has failed to meet its burden under the designated issues and that Hometown's renewal application should be denied.

Findings of Fact

Background

3. Station WAYB(AM) (WAYB) went on the air in 1947 and remained on the air until 1990 or 1991. Hometown's principal, Phillipp C. Showers, a former employee of WAYB and a native of Waynesboro, succeeded in returning WAYB to the air on September 1, 1994. Showers states that the total cost of doing so, involving the unanticipated costs of erecting a new tower, leasing a new studio site and improving the studio building, exceeded \$100,000. After experiencing six months of operating losses on top of all of the unanticipated expenses, Showers asserts he had no choice but to go silent on March 17, 1995.

4. In March 1995, before going silent, Showers filed a request for Special Temporary Authority to remain silent.¹ Shower's request was granted by letter dated August 16, 1995² for the station to remain silent for six months from the date of the letter. This authority expired February 16, 1996. No further request to remain silent was filed by Hometown.

¹ The HDO states that Hometown's STA request was filed on August 8, 1995. However, correspondence from the Commission dated March 30, 1995, shows it was filed on the earlier date.

² Action on Hometown's STA request was delayed because of Hometown's failure to file the required Anti-Drug Abuse Act Certification.

Issue (1) - Expeditious Return To The Air

5. Hometown has negotiated to assign the WAYB license to Brenda Merica and Randall Fields (Merica & Fields),³ who are prepared to return the station to the air within ninety days. Showers began negotiating to assign the WAYB license to Merica & Fields in August 1995. These negotiations were delayed until Merica and Fields were able to negotiate successfully the purchase of a tower. During this time, Merica & Fields also were in negotiations with the major creditor of Hometown, Ken Edwards, who owns the station's assets, to purchase the equipment necessary to put the station back on the air. An agreement to transfer the assets was signed on May 24, 1996. Merica & Fields have prepared and are ready to file an assignment application and are prepared to return WAYB to the air.

6. Hometown initially intended to assign the WAYB license to Edwards and a group of local businessmen, as stated in the June 1995 renewal application. That plan changed when Merica & Fields expressed an interest in acquiring the station in August 1995. Edwards and the other local businessmen, who had no broadcast experience, decided to step aside and assist Merica and Fields in their efforts.⁴

7. On July 17, 1995, after a prehearing conference was held in this proceeding, Hometown filed a supplement to its motion. Therein it relates how it intends to return the station to the air within 90 days. Hometown reports that Showers, Hometown's President, has reached an agreement with all parties as follows: Hometown will sell the station to Valley Communications L.C. (Valley), a company established for that purpose by Merica and Fields; Edwards, the major creditor, will lease all the broadcast equipment to Hometown for a (renewable) period of one year or until the assignment to Valley is approved; and Edwards will make the studio site available pursuant to a lease. Hometown continues to hold a valid lease for the tower site, which combined with the studio and equipment, will enable the resumption of operations. In addition, Hometown will employ Fields as General Manager. Showers has discussed programming and format with Fields and Fields has lined up certain employees to work for the station. Hometown will enter into a Local Marketing Agreement (LMA) with Valley for a (renewable) one-year term or until the assignment to Valley is approved. In the event the proposed assignment to Valley is not approved, the equipment lease and the LMA will continue in effect for a year, with an option to renew. In this connection, Showers recognizes that Hometown is the licensee of the station and must retain ultimate control over station operations. He asserts that under the

³ Fields and Merica are local citizens and experienced broadcasters. Fields served as General Manager of Station WPKZ (FM) in Elkton, Virginia. Merica is one of the owner of Station WPKZ.

⁴ The Bureau's characterization of Hometown's predesignation effort to restore WAYB's operation as dilatory is not borne out by the facts. The evidence (paragraphs 5 and 6) shows, to the contrary, that Showers has acted in a diligent manner. In this connection, it should also be noted that issue (1) speaks to the present, not the past.

agreements, Hometown would remain licensee until the FCC approves the assignment of the license to another entity.

Issue (2) - Violations of Rules 73.1740 and 73-1750

8. As previously noted in paragraph 4, Hometown's authority to remain silent expired on February 16, 1996 and no further request to remain silent was filed. Consequently, when this case was designated for hearing on May 22, 1996, the station had remained silent for approximately three months without authority. Showers admits that Hometown violated Section 73.1740(a)(4) of the Rules. In this regard, Showers states:

"Upon reading the Hearing Designation Order, I realized that the authority to remain silent expired on February 16, 1996. I have no excuse for not seeking additional time except that I simply lost track of the time. I was still negotiating for the sale of the station throughout this period. In addition, I had to take another job to support my family and was distracted by other matters."

9. In support of the claim that a grant of WAYB's renewal will serve the public interest, Hometown submits the statement of Schuyler M. Giles, City Manager of Waynesboro. Giles states therein that Waynesboro has a need for a local radio station and the city fully supports Fields and Merica in their efforts to return the station to the air.

CONCLUSIONS

10. Section 1.251 of the Commission's Rules provides for summary decision where there is no genuine issue of material fact for determination at hearing. New Broadcasting Corp., 44 FCC 2d 386 (1973). A request for summary decision requires a showing that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." Big Country Radio, Inc., 50 FCC 2d 967 (1975). The Presiding Judge agrees with the parties that there is no genuine dispute as to any material fact and that disposition by summary decision is appropriate. Further, the findings support a grant of Homewood's motion for summary decision and a denial of the Bureau's counter-motion.

11. Issue (1) seeks to determine whether Homewood has the capability and intent to resume broadcast operations expeditiously. Hometown's motion, as supplemented, evidences a plan which will permit WAYB to return to the air expeditiously.

12. Hometown lost title to all of its equipment to Ken Edwards. Hometown has now reached an agreement with Edwards whereby Hometown will have all the equipment it needs to operate. In addition, Hometown will employ Fields as General Manager. Showers has discussed

programming and format with Fields and Fields has lined up employees to work for the station. Hometown will enter into a Local Marketing Agreement (LMA) with Valley which will also have a term of one year, renewable, or until the assignment of license to Valley is approved. All of the parties acknowledge that Hometown, the licensee, will retain full and complete control over station operation until the FCC approves the assignment of the license to another entity. Hometown's proposed arrangement to return to the air within 90 days appears to be similar to that approved in American Music Radio, 10 FCC Rcd 8769, cited by Hometown. Since Hometown has demonstrated it has the capability and intent to resume broadcast operations expeditiously, issue (1) is resolved in its favor.

13. Issue (2) calls for a determination whether Hometown has violated Sections 73.1740 and/or 73.1750 of the Rules. With respect to the latter Rule, Section 73.1750 requires that a licensee notify the Commission of its intent to permanently discontinue operation. Hometown's efforts to return WAYB to the air expeditiously make clear that Hometown never intended a permanent discontinuance of operations. Therefore, Hometown did not violate Section 73.1750.

14. Section 73.1740 of the Commission's Rules prescribes minimum operating schedules for commercial broadcast licensees. Among other things, the rule requires that, if a licensee is going to keep its station off the air for more than 30 days, it must obtain authorization from the Commission to do so. Section 73.1740(a)(4). Commission authority to operate less than the minimum required by Section 73.1740 is conferred by a grant of special temporary authority pursuant to Section 73.1635 of the Commission's Rules.

15. Hometown's authority to remain silent expired on February 16, 1996 and no further request to remain silent was filed. Thus, when this case was designated for hearing on May 22, 1996, the station had remained silent for approximately three months without authority. Hometown's failure to seek further authorization to remain silent violated Section 73.1740. However, the evidence indicates that the rule violation was inadvertent and of short duration and not a deliberate flouting of the Commission's Rules. Under the circumstances, the rule violation does not impact adversely upon the licensee's basic qualifications. See Video Marketing Network, Inc., 10 FCC Rcd 7611, 7613 (MMB 1995); Cavan Communications, 10 FCC Rcd 2873 (ALJ 1995).

16. In summary, issue (1) has been resolved in favor of Hometown. With respect to issue (2), Hometown did not violate Section 73.1750. While Hometown violated Section 73.1740, such rule violation is not disqualifying. It is, therefore, ultimately concluded that the public interest, convenience and necessity would be served by a grant of Hometown's renewal application.

Accordingly, IT IS ORDERED, That the Mass Media Bureau's Countermotion for Summary Decision filed July 23, 1996 IS DENIED; and That the Motion For Summary Decision filed March 11, 1996 by Hometown Media, Inc. as supplemented on July 17, 1996, IS GRANTED.

IT IS FURTHER ORDERED, That the above captioned application of Hometown Media, Inc. for renewal of license for Station WAYB(AM) IS GRANTED subject to the condition that the station SHALL RESUME broadcast operations on or before January 15, 1997.

FEDERAL COMMUNICATIONS COMMISSION

**Joseph Chachkin
Administrative Law Judge**